Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-327

JUNE TERM, 2018

State of Vermont v. Henry K. Foster*	}	APPEALED FROM:
	}	
	}	Superior Court, Addison Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 560-12-15 Ancr
		Trial Judge: Samuel Hoar, Jr.

In the above-entitled cause, the Clerk will enter:

Defendant appeals pro se from his conviction for lewd and lascivious conduct. He claims that the State's sole witness committed perjury at his trial. We affirm.

In December 2015, defendant was charged with one count of lewd and lascivious conduct in violation of 13 V.S.A. § 2601. A jury trial was held in April 2017. The only witness presented by the State was the complainant, who is the younger sister of defendant's wife. The complainant testified that on August 3, 2015, she went to the home of defendant and her sister to babysit their children for the night. She was sixteen years old at the time. During the evening, defendant made sexual remarks about her and her friends. He gave her a bottle of Hennessy liquor and told her she could drink it. She did not drink any. She eventually went to sleep in the children's room. During the night, she woke up and saw defendant standing next to her bed masturbating. She was disgusted and scared but did not say anything because her nephew was in the other bed sleeping. She testified that defendant ejaculated onto her left arm, and then left the room. She did not tell anyone right away because she did not think they would believe her. Finally, a few months later, she told her mother and they decided to report the incident to the police.

On cross-examination, the complainant stated that at some point after the masturbation incident, she went to defendant's house to try to convince her sister to leave him. Her sister refused and told her to leave. Defendant's attorney unsuccessfully attempted to elicit an admission from the complainant that she kicked her sister's Camaro as she left the premises. The following exchange then took place:

> Q. It was after this incident, where your sister escorted you from her house, that you then went to the police station; isn't that correct?
>
> A. No.
>
> Q. Did you not go to the police to make this report after this event where your sister escorted you from the house and locked you out?

A. I don't believe so. It was before. When my mom picked me up from Stafford.

. . .

Q. And your testimony is that you went to the police department, spoke with someone who was an officer on the 24th of November 2015, before you confronted your sister about leaving the Foster residence, in which she escorted you out and locked you out?

A. I believe so.

After the State rested, defendant called his wife as a witness. She testified about her confrontation with the complainant. She said that after she forced the complainant to leave her house, the complainant kicked her car, causing damage. She could not recall the date of their confrontation, only that it occurred "[a]bout" a month after a birthday party that took place in October. On cross-examination, she stated that after being told of the allegation against defendant, she asked him about it and he acknowledged having masturbated in front of the complainant in their children's room. Defendant did not testify. The jury found defendant guilty, and he was sentenced to serve three to five years in prison.

On appeal, defendant claims that the complainant lied under oath when she said that she had reported the masturbation incident to the police prior to the confrontation with her sister. According to defendant, a Vermont State Police report proves that the complainant's alleged vandalism of the Camaro occurred on November 23, 2015, the day before she first reported the masturbation incident to police. He argues that the timing of these events was critical to his defense that the complainant only reported the masturbation incident to cover up her vandalism of the car. Therefore, he claims, her alleged lie requires the judgment against him to be reversed.

Defendant did not object to the allegedly false testimony at trial, nor did he request a limiting instruction or ask for a mistrial. He therefore failed to preserve the issue for appeal, meaning that we may review the record only for plain error. State v. Lampman, 2011 VT 50, ¶ 6, 190 Vt. 512 (mem.) (explaining that unpreserved claims of error are reviewed under plain-error standard). "Plain error exists only in exceptional circumstances where a failure to recognize error would result in a miscarriage of justice, or where there is glaring error so grave and serious that it strikes at the very heart of the defendant's constitutional rights." State v. Pelican, 160 Vt. 536, 538 (1993) (quotation omitted). "Where admission of prejudicial evidence is claimed as plain error, the appellant must show the judgment was substantially affected by the admission." State v. Babson, 2006 VT 96, ¶ 8, 180 Vt. 602 (mem.) (quotation omitted). Defendant has failed to meet that standard here.

First, defendant has failed to demonstrate that the complainant lied to the jury. One of the required elements of perjury is a false statement. State v. Lawrence, 134 Vt. 373, 373 (1976). The record does not support defendant's claim that the complainant testified falsely. Neither the complainant nor her sister recalled the precise date of their confrontation, and there was no other evidence of when it occurred. Defendant did not introduce the police report about the alleged vandalism into evidence at trial and it is not part of the record on appeal.[*] The complainant's

[*] Defendant submitted to this Court a screenshot of an "Incident Report" in which every line is redacted except for the date, November 23, 2015, as well as a repair estimate for the Camaro. These documents were not entered below and we therefore do not consider them. See V.R.A.P. 10(a) (record on appeal is limited to the evidence and exhibits filed in the trial court).

testimony about the circumstances of that event may have been evasive, but her statements about when it took place were not contradicted by any other information in the record. Nor were her statements so inconsistent that she necessarily must have believed one of them to be false. See 13 V.S.A. § 2901a.

Moreover, even if defendant were able to prove that the complainant testified falsely about the timing of her report to police, he has not shown that the verdict was "substantially affected" by the evidence. See Babson, 2006 VT 96, ¶ 8. The complainant testified in detail about the masturbation incident and was subjected to extensive cross-examination. Her testimony was largely corroborated by defendant's own witness, his wife, who testified that defendant had admitted to masturbating in front of the complainant. This "independent evidence of defendant's guilt overwhelms any effect the erroneous testimony may have had on the verdict." Id. ¶ 10. We therefore see no reason to disturb the judgment.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice